

## FOREWORD

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The Annual Review is a yearly publication of the *Berkeley Technology Law Journal* that provides a summary of many of the major developments at the intersection of law and technology. Our aim is to provide a valuable resource for judges, policymakers, practitioners, students, and scholars. Each Note provides a primer into a particular area of law, a development in that area of law, and commentary on that development.

The twenty-two Notes in this issue continue a tradition of covering a wide range of topics. The Notes address developments in traditional intellectual property areas—patent, copyright, and trademark law—along with developments in cyberlaw and privacy. Following the Notes in each area of law, we have included Additional Developments which are brief descriptions of important developments not addressed in the Notes.

### I. PATENT LAW

This year's Annual Review covers a wide range of developments in the area of patent law. Our first Note discusses the obvious to try test in the context of gene patents after *KSR International Co. v. Teleflex Inc.*<sup>1</sup> The KSR Court indicated that an invention may be obvious if it is obvious to try. The Note focuses on a post-KSR case, *In re Kubin*,<sup>2</sup> that the obvious to try test applies to the unpredictable art of biotechnology, which arguably lowers the obviousness bar for gene patents. The Note concludes that *Kubin* does not apply an appropriate obviousness standard that accounts for the complexity, unpredictability, and costly nature of biotechnology innovations.

The second Note in the patent law section addresses the use of opinion letters after *In re Seagate*.<sup>3</sup> Even after *Seagate*, opinion letters lack the credibility and utility that *Seagate* sought to restore. The Note concludes by suggesting that the value of opinion letters can be restored through widespread adoption of the Northern District of California model jury instructions.

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1. 550 U.S. 398 (2007).

2. 561 F.3d 1351 (Fed. Cir. 2009).

3. 497 F.3d 1360 (Fed. Cir. 2007) (en banc).

The next Note surveys forum shopping and venue transfer issues in patent infringement lawsuits. Although recent developments allow defendants to more easily transfer cases out of unfavorable venues, courts struggle to clearly define their cases. The Note concludes by suggesting that proposed Congressional bills would codify a clear framework for the courts to use when analyzing venue transfer motions.

The fourth Note discusses the effects of patent licensing on efforts to combat the spread of HIV and AIDS. The Note focuses on the intersection of scientific progress in the mid-1990s that vastly improved the treatment of HIV and AIDS and the emergence of patent protection in India during that same period time. Because patent protection delays the availability of affordable generic drugs in the developing world, the areas that need effective treatment options only receive highly toxic and largely ineffective treatments. The Note concludes that public aid organizations should procure safer and more effective drugs, even if fewer people have access to the treatments.

The next Note focuses on follow-on biologics and the extension of the Hatch-Waxman Act to such innovations. Modern science cannot reliably determine whether a follow-on biologic is bioequivalent to an innovator biologic, which creates potentially higher developments costs and suggests that changes must be made to the Hatch-Waxman framework for follow-on biologics. The Note concludes that the FDA faces a difficult challenge in setting the bar for clinical trials, and questions whether Congress should delegate the FDA the power to effectively create or stifle the entire follow-on biologics industry.

The final patent Note discusses patent intermediaries and their emerging importance in business strategy. Although patents are intangible, many companies now value their patent portfolios highly and patent assets have emerged as part of a valuable marketplace. The Note discusses the emerging categories of patent intermediaries and their long-term significance, concluding that creative and innovative intermediaries will likely profit from relatively untapped patent marketplace.

## II. COPYRIGHT LAW

Technological advances, such as the smartphone, are constantly pushing the boundaries of copyright law. Our first Note in the copyright section of the Annual Review discusses the practice of jailbreaking these phones from lock-ins which are implemented through technical protection measures (TPMs). The Note applies the limited case law on section 1201 of the Digital

Millennium Copyright Act (DMCA) to the Apple iPhone App Store.<sup>4</sup> The Note argues for the adoption of a functionalist approach to anti-circumvention instead of a formalistic approach which does not further the goal of the DMCA, the protection of works in the digital age, because it turns on arbitrary idiosyncrasies of software design and circumvention method. The Note proposes a two-step functionalist analysis to analyze liability under section 1201 in cases involving aftermarket goods or services in order to be consistent with the drafter's intent.

The second Note in the copyright section explores emerging media technologies in relation to entitlement theories and intellectual property rights. The Note evaluates the structure and history of the digital performance right in the context of non-interactive webcasting and tests it against two articles by entitlement theorists. The Note concludes that reducing the number of bargaining parties through collective rights organizations can produce some degree of exchange and thus they should be supported in both liability rule and property rule entitlement schemes.

The third Note in the Annual Review examines the World Trade Organization's decision regarding Chinese market access for U.S. content industries.<sup>5</sup> The decision was issued as a resolution to a formal challenge by the United States in April of 2007 of China's official policies, practices, and enforcement measures related to protection of Intellectual Property Rights. The Note argues that although the United States won a significant victory in the Panel's decision, the victory is not without controversy. The Note concludes that the decision supports the idea that China is moving towards a polity with greater respect for cultural goods and the Intellectual Property Rights embedded therein.

Following ten years of rapid growth, online copyright infringement still represents a significant challenge to modern copyright owners. The fourth Note examines the two litigation campaigns of the Recording Industry Association of America (RIAA), focusing on the two cases that reached the jury: *Capitol Records, Inc. v. Thomas-Rasset*<sup>6</sup> and *Sony BMG Music Entertainment v. Tenenbaum*.<sup>7</sup> The Note concludes that an alternate dispute resolution process based on Professors Mark A. Lemley and R. Anthony Reese's proposal would give copyright holders and Internet users a more effective and efficient means of conflict resolution.

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4. Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2006).

5. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 1.1, WT/DS363/R (Aug. 12, 2009).

6. No. 07cv11446-NG (D. Mass. Dec. 7, 2009).

7. No. 06-1497, slip op. (D. Minn. June 19, 2009).

The fifth Note also discusses the problem of copyright infringement, brought about by the rise of user generated content. The Note analyzes the conflicting approaches to the section 512(c) safe harbor of the DMCA, which requires that the service provider not directly benefit from infringing activity that it has the right and ability to control.<sup>8</sup> Although the defendant won summary judgment under the safe harbor in both *Io Group, Inc. v. Veoh Networks, Inc.*<sup>9</sup> and *UMG Recordings, Inc. v. Veoh Networks, Inc.*,<sup>10</sup> the courts in both cases expressed incompatible understandings of section 512(c). The Note concludes that the *UMG* court's understanding, that a service provider's "right and ability" to control is connected to its level of involvement with the infringing activity, was superior because of its consistency with Congressional intent.

Our last copyright Note explores the problems technological advances can have on traditional content providers such as newspapers. It discusses the tort of "hot news" misappropriation, in the context of the Associated Press suit against online news-aggregator All Headline News,<sup>11</sup> and its effects on online journalism. The Note concludes that the *All Headline News* case serves as an indication of the evolving customary practices between newspapers and aggregators that, in combination with other newspaper-saving methods, will help create a sustainable equilibrium of newsgathering and dissemination.

### III. TRADEMARK LAW

The first Note in the trademark section discusses the likelihood of confusion as it pertains to keyword advertising. The Note suggests that the likelihood of confusion in *Rescuecom v. Google Inc.* should turn on consumer sophistication. The Note concludes by suggesting that out of court settlements often prevent courts from deciding likelihood of confusion cases on their merits, and that clear standards for trademark infringement in keyword advertising are largely unavailable.

The second Note discusses the use of architectural works in video games. Because the current law in this area is not well settled, the video game industry has shied away from the use of trademarks in their games. The Note concludes that such shyness detracts from the realism in video games and unnecessarily diminishes a player's experience, and the Note suggests that courts should establish strong precedents that support a game developers

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8. Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006).

9. 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

10. 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

11. *The Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

right to use trademarked and copyrighted architecture for the purpose of creating virtual worlds.

The final trademark Note focuses on domain name speculation. Although legal tools have emerged to fight the domain name speculation problem, the business model has persevered and continues to thrive in many respects. The Note concludes by suggesting that trademark law should not be the preferred method for combating domain name speculation. Instead, the Note advocates policy changes, technological solutions, and social engineering to combat the problem.

#### **IV. CYBERLAW**

The first Note in the cyberlaw section of the Annual Review is a survey of recent state legislative efforts to promote internet safety, exploring the legal ramifications of their implementation. The Note discusses regulations addressing sex offenders and cyberbullying online, and evaluates proposed solutions to online safety issues and finds them problematic because of constitutional concerns. The Note concludes that comprehensive education is the best available solution to the problems of social networking safety and cyberbullying.

The next cyberlaw Note explores recent developments in the law regarding internet gambling. The Note argues that federal and state laws from both before and after the conception of the Internet have created an unnavigable patchwork of regulation. The Note argues that the lack of effective regulation not only hurts American bettors who have little recourse against unfair internet gambling, but also results in federal tax losses of up to \$62.7 billion over the next decade. The Note concludes that as the political mood becomes more amendable to internet gambling, nationwide legalization could be a possibility.

The third cyberlaw Note addresses the growing problem of sexting among teens, the digital exchange of sexually explicit images using text messaging services on camera-equipped cell phones. The Note attempts to strike a balance between competing policy objectives, such as teenage privacy and the state's interest in preventing child sexual abuse and child pornography, while respecting the extent to which the digital revolution changed how teenagers communicate and interact in social spaces. It suggests several legislative components that could help authorities discipline the harms of sexting without resorting to ill-suited child pornography statutes. The Note concludes by offering a framework for developing a more balanced response appropriate to the injuries at stake and the underlying policy issues implicated by the behavior.

The last cyberlaw Note continues the Annual Review's discussion of section 230 of the Communication Decency Act (CDA), a statute designed to shield online service providers from liability for content posted by users.<sup>12</sup> The Note addresses the issue in the context of the recent crimes involving Craigslist, a popular website that enables users to post classified ads and interact in forums. The Note concludes that section 230 should no longer be considered a source of blanket immunity for interactive service providers.

## V. PRIVACY LAW

The first privacy law Note addresses the emerging issue of cloud computing and stored communications and focuses on privacy issues raised by *Quon v. Arch Wireless Operating Co.*<sup>13</sup> The Note analyzes the interplay between the Fourth Amendment and the privacy issues involved in cloud computing technologies, and suggests that the Supreme Court will likely recognize a reasonable expectation of privacy communications such as text messages and emails. The Note concludes by advocating that the Court bring the Fourth Amendment into the twenty-first century and protect information that will inevitably involve cloud computing technologies.

The second Note focuses on *IMS Health v. Ayotte*,<sup>14</sup> which implicates significant privacy concerns associated with pharmaceutical advertising. The Note discusses commercial speech jurisprudence and recent cases that discuss commercial speech in New Hampshire, Maine, and Vermont. The Note concludes by predicting that the first circuit's unique approach to commercial speech in *IMS Health* will not be adopted elsewhere.

The final Note discusses deceptive business practices and the requirements that companies must follow in order to avoid liability. The Note describes the Federal Trade Commission's authority to address privacy violations and explains the relevant legal test for establishing liability. The Note concludes by recommending appropriate privacy disclosure measures that should enable companies to avoid engaging in deceptive business practices, in particular those deceptive practices involving information tracking.

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12. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

13. 529 F.3d 892 (9th Cir. 2008).

14. 550 F.3d 42 (1st Cir. 2008).